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No. 07-25

IN THE
Supreme Court of the United States

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are the Indiana Democratic Party and the Marion County Democratic Central Committee, who sued Respondents Todd Rokita, in his official capacity as Indiana Secretary of State, J. Bradley King and Pamela Potesta, in their official capacities as Co-Directors of the Indiana Election Division, and the Marion County Election Board. Ms. Potesta has replaced Kristi Robertson.

In the trial court, on appeal, and now in this Court, this case was consolidated with a case brought by Petitioners William Crawford, Joseph Simpson, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition of Housing and Homeless Issues (which has now withdrawn from the case), and the Indianapolis Branch of the NAACP (collectively, the "*Crawford* Petitioners"). Respondents in that case are the Marion County Election Board and the State of Indiana.

RULE 29.6 DISCLOSURE STATEMENT

The corporate disclosure statement in Petitioners' petition for a writ of certiorari remains current and accurate. The Indiana Democratic Party is an Indiana not-for-profit corporation, and the Marion County Democratic Central Committee is an unincorporated political-party organization. Both Petitioners have their principal places of business in Indiana, and neither Petitioner has a parent corporation or issues stock.

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OPINIONS BELOW

The majority and dissenting opinions of a panel of the United States Court of Appeals for the Seventh Circuit are reported at 472 F.3d 949 and are reprinted at Pet. App. 1a-15a.[1] The Seventh Circuit's denial of a timely petition for rehearing, with suggestion for rehearing *en banc*, with four judges dissenting, is reported at 484 F.3d 436 and is reprinted at Pet. App. 150a-155a. The decision of the District Court for the Southern District of Indiana is reported at 458 F. Supp. 2d 775 and is reprinted at Pet. App. 16a-149a.

JURISDICTION

The Court of Appeals' panel opinion is dated January 4, 2007, and its order denying the petition for rehearing with suggestion for hearing *en banc* is dated April 5, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution in part prohibits laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part: "No

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[1] All references to "Pet. App." are to the *Crawford* Petitioners' Appendix, which Petitioners have adopted by letter to the Clerk dated July 2, 2007.

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of the Fourteenth Amendment provides in part that the size of a State's delegation to the House of Representatives "shall be reduced" if the State "denie[s] . . . or in any way abridge[s]" the "right to vote at any election for the choice of [a federal or state officeholder]."

Indiana Code § 3-11-8-25.1 provides that all voters seeking to vote in person must present proof of identification, unless they are voting in person in a state-licensed facility where they reside. A voter who does not present identification may submit only a provisional ballot. The statute is reproduced at Pet. App. 156a-158a. Indiana Code § 3-11-10-1.2, which states that this proof of identification is not required for mail-in absentee ballots, is reproduced at Pet. App. 158a.

Indiana Code § 3-11.7-5-2.5 specifies the steps that a prospective voter must go through, once a provisional ballot is cast, to have his provisional ballot counted after being refused the opportunity to cast a regular ballot. It is reproduced at Pet. App. 159a-161a. If these steps are not accomplished, the provisional ballot is declared "invalid" and will not be counted. Ind. Code § 3-11.7-5-3.

Indiana Code § 3-5-2-40.5 defines the "[p]roof of identification" that must be produced to vote in person as

> a document that satisfies all the following:
>
> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
>
> (2) The document shows a photograph of the individual to whom the document was issued.
>
> (3) The document includes an expiration date, and the document:
>
> (A) is not expired; or
>
> (B) expired after the date of the most recent general election.
>
> (4) The document was issued by the United States or the state of Indiana.

STATEMENT OF THE CASE

In 2005, the State of Indiana, for the first time in its history, began requiring voters at their polling places to show government-issued photographic identification cards with specific characteristics. The photo-identification requirement imposed by Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005 (the "Photo ID Law"), was not enacted in response to any record of voter-impersonation fraud at the polls in Indiana. No one has ever been prosecuted for in-person voter fraud in Indiana's history. Nor has

anyone ever cited a single episode of such fraud occurring in the State.

But what the legislators who passed the Photo ID Law did know was that it would burden voting by a group of eligible voters who lack the requisite identification because they do not drive and have no other regular need for state-issued photo ID — primarily elderly, disabled, poor, and minority voters. Because these voters tend to support Democratic candidates, there was good reason to think that the suppression of turnout caused by the new law would primarily harm Democrats. Indeed, the law was passed by a party-line vote shortly after the Republican Party won control of both houses of the state legislature as well as the Governor's office. This effective disenfranchisement of voters lacking government-issued photo ID is not sufficiently tailored to achieving any legitimate state interest.

I. Voting in Indiana Prior to Passage of the Photo ID Law

Prior to enactment of the Photo ID Law in 2005, Indiana voters were not required to present photo identification.[2] Rather, a voter was instructed to

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[2] Indiana requires that voters register (by mail or in person) prior to Election Day but does not require voters to present photo ID when registering. Pet. App. 22a. Under the Help America Vote Act of 2002 ("HAVA"), the first time a voter who has registered by mail votes in a federal election (either in person or by mail), if the voter's identity has not already been confirmed (for example, by matching the last four digits of his Social Security number to a state database), the voter must provide either "a copy of a current and valid photo

sign the poll book, and the voter's signature would be compared to the copy on file with the election board. Pet. App. 28a. If a voter was challenged, the challenger would sign an affidavit, the voter would sign a counter-affidavit, and the voter would be allowed to vote a regular ballot. *Id.* at 29a. After the ballot was cast and counted, the challenging affidavits would be sent to a prosecutor for investigation. *Id.*

Until Congress passed the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15483(b), Indiana law did not provide for the casting of a provisional ballot when a voter's residence status or identity was challenged. Pet. App. 29a. Indiana first began using provisional ballots in the 2004 election. *Id.* at 30a. Those ballots, once cast, had a low likelihood of ever being counted. Statewide, 85% of provisional ballots were not counted in 2004. *Id.*

Only limited categories of Indiana voters were allowed to vote absentee. *Id.* at 5a-6a. Eligibility was limited primarily to persons who would be absent from the county on Election Day, persons who would be working for the entire 12 hours that the polls were open, the elderly, and the disabled. Ind. Code § 3-11-10-24(a). To vote absentee by mail, one had to apply for an absentee ballot at least eight days before the election, wait for it to arrive in the

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identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." 42 U.S.C. § 15483(b)(2)(A).

mail, fill out the ballot and place it in a special envelope, sign an affidavit on the envelope attesting to one's identity, and then mail it back to the county election board in time to arrive by noon on Election Day. *Id.* §§ 3-11-4-2, 3-11-4-3(4), 3-11-4-21, 3-11-10-11, 3-11-10-14. If the absentee ballot arrived on time, the voter's identity was then confirmed by comparing the signature on the affidavit to a signature kept on file, a process the State deems sufficient "to ensure that there is no fraud and that the election is both safe and secure." Pet. App. 27a n.10 (citing King Dep. 126); *see* Ind. Code §§ 3-11-10-4, 3-11-10-15, 3-11-10-16.

There was no requirement that those voting via absentee mail-in ballot ever produce photo identification. Ind. Code §§ 3-11-10-1.2, 3-11-10-22(c). That remains true today as well.

II. Passage of the Photo ID Law

In the November 2004 election, the Indiana Republican Party gained control of the Indiana House and the governorship, giving the party unified control of state government for the first time since 1988. Shortly after returning to session in January 2005, Republican members of the General Assembly sponsored bills conditioning the right to vote on presentation of certain photographic identification.

The photo-identification bills addressed only one narrow category of potential election fraud — in-person voter-impersonation fraud occurring at the polling place on Election Day. *See* Pet. App. 7a (law addresses "the form of voting fraud in which a person shows up at the polls claiming to be someone else —

someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day").

It is undisputed that prior to enactment of the Photo ID Law, Indiana had never prosecuted a case of in-person voter fraud. *Id.* at 39a. Indeed, the State of Indiana conceded that it was not even *aware* of any actual incidents of in-person fraud. *See id.* ("[T]he State of Indiana is not aware of any incidents or person attempting [to] vote, or voting, at a voting place with fraudulent or otherwise false identification.") (citing interrogatory response). A member of the Indiana House Elections Committee testified that since his election in 1996, not a single legislator or interest group had ever come before the committee indicating, by anecdote or data, that Indiana had a problem with in-person voting fraud. Mahern Aff. 2-5. The same member recalls that Indiana Secretary of State Todd Rokita, the State's chief election official and a prime supporter of the Photo ID Law, offered no evidence in testimony before that committee of in-person voting fraud in Indiana. *Id.*; *see* Pet. App. 39a.

By contrast, the State was aware of actual incidents of absentee-ballot fraud. When Secretary Rokita testified before Congress in early 2005, his description of fraud in Indiana focused entirely on absentee-ballot fraud, not in-person fraud.[3] The

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[3] *See* Test. of Sec'y of State Rokita before House Admin. Comm., Feb. 9, 2005, at 9 [hereinafter "Rokita Test."] ("In many places

Indiana Supreme Court, finding "overwhelming evidence of election misconduct" in the casting of absentee ballots, recently had vacated the results of the East Chicago mayoral primary after 7.9% of the absentee ballots were invalidated. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1140-41, 1145 (Ind. 2004). Moreover, it was absentee-ballot fraud that was more likely in States like Indiana with voter-registration rolls that had not been purged and updated.[4] *See* Lori Minnite & David Callahan, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 25 (2003) (citing "high-profile cases of voter fraud involving the manipulation of 'deadwood' voter

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around Indiana, the documented and alleged vote fraud we see centers around abuses of absentee ballots, in addition to the problems with bloated voter registration lists detailed previously in this testimony."), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVQ.pdf. After detailing absentee-ballot abuses, Rokita praised photo ID requirements for in-person voting, but suggested no connection between the two. *Id.*

[4] Indiana had long been aware that its voter-registration rolls were inflated with invalid registrations. *See* J.A. 145-65; *see also* Rokita Test. at 5-6. Indiana's failure to properly maintain its voter-registration lists led to its being sued by the United States in 2006 for noncompliance with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.* Indiana signed a consent decree stating that it had "failed to conduct an adequate general program of list maintenance that makes a reasonable effort to identify and remove the names of ineligible voters from the voter registration list." J.A. 300.

registration records, mostly through absentee-ballot fraud"), *available at* State Ex. 6.[5]

Despite the absence of a practice or credible threat of in-person voting fraud in Indiana, and despite a history of absentee-ballot fraud, the Indiana General Assembly imposed no new identification requirements for the mail-in absentee-voting process, preferring instead to impose a strict voter-identification requirement on citizens voting in person.[6] The Photo ID Law was strenuously opposed by the Indiana Democratic Party and its members, as well as a variety of organizations representing elderly, disabled, poor, and minority voters. The bill eventually passed on party-line votes in both chambers, with not a single Democratic or Republican defector.[7] On April 27, 2005, it was signed into law by the Republican Governor.

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[5] Professor Minnite's 2003 study is available at http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf. For an updated edition, see Lorraine C. Minnite, AN ANALYSIS OF VOTER FRAUD IN THE U.S. (Sept. 2007), *available at* http://www.demos.org/pubs/analysis_voter _fraud.pdf.

[6] Voters casting an absentee ballot by appearing in person at an absentee voter board prior to Election Day also are now required to produce photo identification. Ind. Code § 3-11-10-26(b)-(c); *see also* Ind. Senate Enrolled Act No. 15, Pub. L. No. 103-2005 (amending absentee-voting laws), *cited in* Pet. App. 17a n.2.

[7] Mary Beth Schneider, *House OKs Strict Voter ID Bill*, INDIANAPOLIS STAR, Mar. 22, 2005, at 1B; Mary Beth Schneider, *Photo ID Law Looming for Hoosiers*, INDIANAPOLIS STAR, Apr. 13, 2005, at 1A.

III. The Requirements of the Photo ID Law

The Photo ID Law materially altered the ability of an eligible voter to cast a vote and have it counted. A voter wishing to vote in person in a primary or general election in Indiana now must provide proof of identification that (1) shows a photograph, (2) shows a name that "conforms" with the voter-registration records, (3) was issued by the State of Indiana or the United States, and (4) had not expired as of the previous general election. Ind. Code § 3-5-2-40.5. A number of government-issued forms of identification, such as cards issued by the Veterans Administration, are not accepted because they lack expiration dates. King Dep. 77-78, 83. Only persons living and voting in a state-licensed facility, such as a nursing home, are exempt from the proof-of-identification requirement. Ind. Code § 3-11-8-25.1(e).

Even if the voter is well known to the precinct pollworkers at his neighborhood polling place, if he is "unable or declines to present the proof of identification," or if "a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification," a member of the precinct board "shall challenge the voter." *Id.* § 3-11-8-25.1(c). A precinct board member's knowing failure to do so is a felony. *Id.* § 3-14-2-14. If the precinct board finds the proof of identification insufficient, there is no process for the voter immediately to appeal, and the voter must either leave the polling place or undertake the provisional-ballot process. Because Indiana closes its polls at 6:00 p.m. (the earliest poll-closing time in the Nation), even voters

who know where to find their photo ID may not have time to leave the polling place, locate their ID, and then return to the polls to vote a regular (nonprovisional) ballot. *Id.* § 3-11-8-8; Pet. App. 78a-79a & n.50.

For those who undertake the provisional-ballot process, the initial step is for the voter to execute an extensive affidavit reciting nine specific facts about the voter, all under penalty of perjury. Ind. Code § 3-11-8-23. The voter is then given a provisional ballot. For that ballot to be counted, however, the voter then must travel to the circuit-court clerk or the county election board within ten days after the election. *Id.* §§ 3-11.7-5-1(b), 3-11.7-5-2.5(a). Upon reaching the circuit-court clerk or the county election board, the voter must execute an affidavit swearing that he is the person who cast the provisional ballot. *Id.* § 3-11.7-5-2.5(b)-(c). The voter then must either (1) show a valid photo ID card or (2) swear that he has a religious objection to being photographed or is an indigent who is unable to obtain proof of identification without paying a fee. *Id.* Although the statute requires a provisional voter to execute an affidavit "affirming under the penalties of perjury" that the voter is "indigent," the statute does not define that term. *Id.* Affidavits of indigency or religious objection are not available at the polling places on Election Day, nor may they be executed prior to Election Day. Rather, each voter must execute a new affidavit after each election, during the ten-day window.

IV. The Burdens of Complying with the Photo ID Law

For many affluent Americans, it may be hard to imagine life without a driver's license, a passport, or other government-issued photo ID. But the reality is that, across the country, about 12% of voting-age Americans lack a driver's license. *See* Comm'n on Fed. Election Reform, BUILDING CONFIDENCE IN U.S. ELECTIONS 73 n.22 (2005) (citing data from the Federal Highway Administration and the Census Bureau). And about 11% of voting-age United States citizens — more than 21 million individuals — lack *any* form of current government-issued photo ID. *See* Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 3 (Nov. 2006) (reporting results from a recent survey by the independent Opinion Research Corporation), *available at* http://vote.caltech.edu/VoterID/CitizensWithoutProof.pdf. That 11% figure grows to 15% for voting-age citizens earning less than $35,000 per year, 18% for citizens at least 65 years old, and 25% for African-American voting-age citizens. *See id.*[8]

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[8] Data from the Georgia Secretary of State's Office that compared voter rolls with driver's license records show that Georgia has 198,000 registered voters with no state-issued photo IDs and that African-Americans are more than twice as likely as whites to fall into that group. *See No ID? Votes Cast Can Become Castoffs*, ATLANTA J.-CONST., Nov. 2, 2007, *available at* http://www.ajc.com/metro/content/metro/stories/2007/11/01/voterid_1102.html.

In Indiana, the most likely forms of photo identification to be sought by voters are driver's licenses and photo-identification cards issued by the Indiana Bureau of Motor Vehicles ("BMV"). Pet. App. 31a. State photo ID cards must be renewed every four years or six years (depending on their date of issuance). Ind. Code § 9-24-16-4(a).

To obtain the photo identification now required to vote in person in Indiana, a significant bloc of voters must undertake a sometimes lengthy and cumbersome process. A voter must appear in person at one of the BMV branch offices, Pet. App. 31a-32a, but the BMV turns away about 60% of applicants for photo ID cards because they do not have the proper supporting documents. *See* Andrews Dep. 28-29. The BMV requires applicants to present either one "primary document," one "secondary document," and one "proof of Indiana residency," or two "primary documents" and one "proof of Indiana residency." Pet. App. 32a. Under BMV rules, a "primary document" verifying identity, date of birth, and citizenship may include "a United States Birth Certificate with a stamp or seal, documents showing that the person was born abroad as an American citizen or is a naturalized citizen, a passport, or a U.S. military or merchant marine photo identification." *Id.* at 32a-33a. Secondary documents include bank statements, certified academic transcripts, court documents, and government-issued ID cards. *Id.* at 33a-34a. To demonstrate Indiana residency, an applicant must show proof of a residential address in the form of either a primary or a secondary document containing the applicant's

current address, or by means of a third category of documents which includes Indiana property deeds, state child-support checks, and change-of-address confirmation forms from the U.S. Postal Service. *Id.* at 35a.

"Primary documents" can be hard to procure for some Indiana voters, particularly for those born out of State. For example, Theresa Clemente, a nondriver who moved from Massachusetts to Indiana in 1991, testified that, when she learned of the new law, she made three trips to the BMV to get a state-issued photo ID, with no success. J.A. 92-95. On her first visit, Ms. Clemente brought her Social Security card, her voter-registration card, a property tax bill, a utility bill, and a credit card, but was told she needed a copy of her birth certificate. *Id.* at 93. On her second visit, Ms. Clemente brought a copy of her Massachusetts birth certificate, but was told she needed a *certified* copy. *Id.* She sent away to Boston for a certified copy, but was told it would cost $28.00. *Id.* She then sent in another request, along with a check, and 14 days later she received the certified copy. *Id.* at 94. On her third trip to the Indiana BMV, Ms. Clemente was told she needed a certified copy of her *marriage* certificate, because her birth certificate showed only her maiden name, Theresa Grady. *Id.* After this entire process — which she described as "humiliating, time consuming, and extremely frustrating" — Ms. Clemente still had no photo ID and thus no ability to cast a vote that would be counted. *Id.*

The process can be similarly convoluted for a voter born in Indiana. He can try to obtain a birth

certificate from either the Indiana Department of Health ("IDOH") or the health department for the county of his birth. Pet. App. 37a. IDOH charges a $10 fee for conducting the birth-certificate search, and county fees vary from $2 to $10. *Id.* at 37a-38a. A person seeking an Indiana birth certificate but lacking a driver's license or state-issued ID card must present a work ID with signature, a military ID with signature, a school ID with signature, a veteran's ID, or a passport. *See id.* at 38a (citing Respondents' Web site). Alternatively, a person must present two of the following: a Social Security card, a credit card with signature, a bank card with signature, a motor-vehicle registration at least six months old, a housing lease at least six months old, a military DD-214 separation report, a valid Indiana professional license, an original employment application at least six months old, or a current voter registration. *See id.*

The Photo ID Law compels voters without sufficient identification to defend themselves against challenges at the polling place at significant time and expense, preventing and deterring eligible voters from casting their ballots and having them counted. When the polls are busy and lines are long, challenges that should be routine sometimes delay voters by 30 minutes or more. Sadler Dep. 18-19; Ford Aff. 3; Haith Aff. 2. Even before the new law passed, voters often were intimidated and left the polls when confronted by a challenger. Pet. App. 46a (citing Haith Aff. 1-2; Bohannan Dep. 50-54; Oakley Dep. 20-21; Simpson Dep. 62-64).

Notably, the State does not make available at the polling place the indigency affidavit or the religious-objection affidavit that is needed to complete the provisional-voting process and to get the ballot counted. Instead, after requiring the voter to sign one affidavit at the polling place to initiate the provisional-voting process, the State requires the voter (who lacks a driver's license and hence cannot drive herself) to take a second trip, to the circuit-court clerk or the county election board, to sign a separate affidavit that permits her to vote without photo ID. Otherwise, her vote never will be counted.

With the exception of indigents and religious objectors who fill out these additional affidavits, anyone who lacked photo ID at the polls and voted provisionally must retrieve or obtain government-issued photo ID and present it to the circuit-court clerk or the county election board within ten days of the election. Ind. Code § 3-11.7-5-2.5(b). Provisional voters who lack identification and are unable to obtain underlying documentation and navigate the BMV's rules before ten days elapse will not have their votes counted. *Id.* §§ 3-11.7-5-1, 3-11.7-5-2.5(f), 3-11.7-5-3.

V. As the State of Indiana Has Admitted, the Photo ID Law Burdens Discrete "Groups of Voters"

The Indiana Secretary of State has admitted that there are certain "groups of voters for whom compliance with [the Photo ID Law] may be difficult" because they are "registered voters who do not possess photo identification; who may have difficulty understanding what the new law requires of them; or who do not have the means necessary to obtain photo

identification." Todd Rokita, *Vote with I.D.: Public Education Initiative* 6 (Oct. 13, 2005), *available at* http://www.in.gov/sos/photoid/VotewithIDPlan_06.pdf *and at* State Ex. 46-A. And the Secretary has expressly identified these groups of burdened voters: "elderly voters, indigent voters, voters with disabilities, first-time voters, [and] re-enfranchised ex-felons." *Id.*

It is not seriously disputed that the Photo ID Law will outright prevent some of these eligible voters from voting, and will deter others. *See* Pet. App. 3a (majority opinion below) ("[T]he Indiana law will deter some people from voting."); *id.* at 13a (dissenting opinion below) (stating that "this law will make it significantly more difficult" for eligible voters to vote); *id.* at 100a, 103a (District Court opinion) (acknowledging that the Photo ID Law "may prevent some otherwise eligible voters from exercising that right"); *see also* J.A. 96-134, 292-97.[9]

Nor is there any serious dispute as to the geographic location, socioeconomic status, or political makeup of the citizens who are most likely to be prevented or deterred from voting by the Photo ID Law. The District Court conservatively estimated that as of 2005 there were approximately "43,000 Indiana [voting-age] residents without a state-issued

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[9] As for Indiana's elderly voters, the District Court accepted AARP-Indiana's survey findings that 3% of registered voters over the age of 60 lack the required photo ID. Pet. App. 104a n.73; *see* J.A. 30-33. The figure likely would be higher if nonregistrants were included. *See* Lyle Aff., Ex. 1.

driver's license or identification card." Pet. App. 69a.[10] The court noted that nearly three-quarters of those persons — approximately 31,500 — were "concentrated" in Marion County, which includes Indianapolis. *Id.* at 69a-70a & nn.40-43. These numbers indicate that an adult in Marion County is more than 16 times as likely as an adult elsewhere in Indiana to lack state-issued photo identification. *See id.* (presenting data indicating that nearly 5% of Marion County adults, but only 0.3% of non-Marion adults, lack state-issued photo ID).

That disparity is not surprising. Indianapolis is the State's dominant urban center, with a total population exceeding that of the next seven largest Indiana cities combined, and with the State's most extensive mass-transit system, and hence more residents without vehicles or driver's licenses.[11] More than 30% of Indianapolis's population is nonwhite, as compared with less than 10% elsewhere in the State.[12] Moreover, in recent years Marion

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[10] The District Court discounted the conclusions drawn by expert affiant Kimball Brace, but made its own calculations regarding the numbers of voting-age Indiana residents lacking the requisite identification, and their county of residence. *See id.* at 69a-70a & nn.40-43.

[11] *See* U.S. Census Bureau, Table 5, Population by Race and Hispanic or Latino Origin, for the 15 Largest Counties and Incorporated Places in Indiana: 2000 [hereinafter "Census Table 5"], *available at* http://www.census.gov/PressRelease/www/2001/tables/ in_tab_5.PDF; *see also* Pet. App. 69a-70a (referring to Indianapolis's metro bus system, IndyGo).

[12] *See* Census Table 5.

County has been trending Democratic relative to the rest of the State, and in 2004 it was one of only four Indiana counties (out of 92 total) that voted for Senator Kerry over President Bush.[13] So, by the District Court's calculations, nearly 75% of the potential voters who lack state-issued photo IDs are concentrated in the State's most heavily urbanized county, a Democratic stronghold.

The partisan imbalance in the effects of the Photo ID Law will not be inconsequential, given Indiana's long-standing history of razor-thin election margins. In 2006, the Indiana House switched from a 52-48 Republican majority to a 51-49 Democratic majority. It was the fifteenth time in the past 35 elections that control of the chamber has switched parties.[14] Three 2006 Indiana House elections were subjected to recounts because only 7, 15, and 27 votes separated the leading candidates.[15]

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[13] *See* United States Presidential Election Results, *available at* http://uselectionatlas.org/RESULTS/index.html. For at least the last decade, no Democratic candidate has won a statewide general election in Indiana without carrying Marion County. *See* Indiana Past Election Results, *available at* http://www.in.gov/sos/elections/elections/index.html.

[14] *See* Tim Storey & Nicole Casal Moore, *Democrats Deliver a Power Punch*, STATE LEGISLATURES, Dec. 2006, at 14, 17.

[15] Jennifer McGilvray, *Recounts in 5 Indiana House Races*, WISHTV8.com, Nov. 29, 2006, *available at* http://wishtv.com/Global/story.asp?s=5746473; *see also Horseman v. Keller*, 841 N.E.2d 164, 166 (Ind. 2006) (city council election decided by five votes after recount); *Curtis v. Butler*, 866 N.E.2d 318, 320 (Ind. Ct. App. 2007) (candidate certified as winner by three votes); *Hathcoat v. Town of Pendleton Election Bd.*, 622 N.E.2d 1352,

The broader ramifications of allowing similarly restrictive photo-identification requirements are also apparent. The 2001 Ford-Carter Commission demonstrated that margins of victory in federal and state elections are frequently less than 1%. It noted that "[i]n the last half century, only two states, Mississippi and South Carolina, have not had a federal or gubernatorial election decided by less than one percent of ballots cast." Nat'l Comm'n on Fed. Election Reform, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 4 (2001). And "since 1948, 22 states have seen presidential contests decided within a percentage point (and 40 states have had presidential contests within two points)." *Id.* at 2.

VI. Proceedings Below

Petitioners, the Indiana Democratic Party and the Marion County Democratic Central Committee, brought suit against three state election officials and the Marion County Election Board in the District

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1353-54 (Ind. Ct. App. 1993) (eight-vote margin of victory in town council election). This Court has dealt with razor-thin margins of victory in Indiana before. *See Roudebush v. Hartke*, 405 U.S. 15, 16 (1972) (1970 U.S. Senate election decided by 4,383 votes, "a margin of approximately one vote per state precinct"); *see also McIntyre v. Fallahay*, 766 F.2d 1078, 1080 (7th Cir. 1985) ("The contest between Richard McIntyre and Frank McCloskey for the Eighth Congressional District in Indiana was the closest election in the history of the House of Representatives. On election night in November 1984, the count showed McCloskey the winner by 72 votes. After a correction of the returns from Gibson County, the count showed McIntyre ahead by 34 votes.").

Court for the Southern District of Indiana to enjoin the Photo ID Law, and the action was consolidated with a separate case brought by the *Crawford* Petitioners. Pet. App. 17a. On cross-motions for summary judgment, the District Court held that the Democratic Party had standing to challenge the Photo ID Law. *Id.* at 77a-83a, 96a. But it upheld the law on the merits, ruling that deference to the legislature's judgment was warranted because a photo-identification requirement for in-person voting would not impose a severe burden on the right to vote. *Id.* at 96a-135a.

A divided Seventh Circuit panel affirmed. *Id.* at 11a. In his opinion for the panel majority, Judge Posner observed that "it is exceedingly difficult to maneuver in today's America without a photo ID," citing as examples that one cannot fly on a commercial plane or enter a federal courthouse without such ID. *Id.* at 3a. The Photo ID Law's impact would be minimal, the panel predicted, declaring that the "benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote), and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in." *Id.* Accordingly, "some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote, rather than go

home and get the ID and return to the polling place." *Id.* While acknowledging that "not much" voter impersonation has been found nationwide, and none in Indiana, the panel majority held that the Photo ID Law was justified because "the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting." *Id.* at 8a-9a.

Judge Evans argued in dissent that the "Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic." *Id.* at 11a. He urged that the law be subjected to strict scrutiny, or "strict scrutiny light," and invalidated as an unlawful burden on the fundamental right to vote. *Id.*

Rehearing *en banc* was denied. *Id.* at 151a. Judge Wood, writing for four judges dissenting from that denial, argued that the Photo ID Law "will harm an identifiable and often-marginalized group of voters to some undetermined degree" and that the courts "should take significant care, including satisfactorily considering the motives behind such a law, before discounting such an injury." *Id.* at 155a.

SUMMARY OF ARGUMENT

1. Under *Burdick v. Takushi*, 504 U.S. 428 (1992), every state law directly regulating the election process is subject to meaningful scrutiny designed to verify that lawmakers (1) are not abusing their control over the process in order to entrench themselves in power and (2) have not imposed burdens on voting that outweigh any legitimate benefits. The degree of scrutiny properly

varies based on the severity of the burden imposed, and whether that burden is distributed in a discriminatory fashion. In addition, courts should take a closer look when there are other indicators that the state interests asserted to justify the burden are more pretextual than genuine. But in *every* case, the State is required to articulate the "precise interests" asserted to justify the law, and the courts are required to "weigh 'the character and magnitude of the asserted injury to [voting] rights'" against the state interests that have been claimed. *Id.* at 434 (citation omitted).

2. Indiana's Photo ID Law requires heightened constitutional scrutiny. It is undisputed that the law burdens voting. For some legitimate voters — those who lack photo ID and are unable to obtain the documents required to get a photo ID — the burden is severe. They simply cannot vote. For others — for example, nondrivers who lack photo ID but might be able to obtain it if they devoted time and effort — the burden is somewhat less, but it is predictable that many in this category will not in fact successfully complete all the steps needed to vote. Taken together, these facts mean that a significant number of citizens will no longer be able to vote under the Indiana Photo ID Law, even though they meet all other eligibility requirements for voting and would have been able to do so under the system of signature verification used successfully at the polls for many decades and still in use for absentee balloting.

Moreover, as the Seventh Circuit acknowledged, there is little doubt that the persons most likely to be

deterred by the new burdens on voting — the indigent, the elderly, the disabled, and minority voters — tend to vote Democratic. Such a disparate partisan impact makes the burden more constitutionally significant, requiring a heightened degree of justification.

Furthermore, this case involves numerous other "danger signs" that the partisan effect just described was in fact what the Indiana legislature set out to achieve. To begin with, there is no evidence that voter-impersonation fraud is a significant problem requiring a remedy. Indiana itself has had no reported example of such fraud occurring. And nationwide, the pattern is similar. To the extent that election fraud does occur, it typically involves abusing absentee voting or manipulating the vote-counting process, not organizing people to impersonate other people at the polls. Yet the Indiana General Assembly chose to focus on in-person voting. Given that this law was passed by a pure party-line vote, in the first months after the Republican Party attained complete control of the State's legislative and executive branches, there is good reason for heightened concern that the "precise interest" identified by the State — the prevention of voter-impersonation fraud — is only a pretext designed to justify a law that effectively suppresses Democratic turnout.

3. Indiana's Photo ID Law cannot withstand the requisite heightened scrutiny — indeed any significant degree of scrutiny. The State cannot justify burdens on the franchise by pointing to a nonexistent problem of "voter-impersonation fraud."

The evidence made clear that no such problem exists in Indiana. And the evidence supposedly marshaled below of occurrences around the country evaporates on inspection. The Court need not address legislative intent directly, because the Photo ID Law clearly fails the *Burdick* balancing test. But if the Court were to do so, the truth is inescapable that Judge Evans was right: Indiana's Photo ID Law is indeed a "thinly veiled" attempt to suppress Democratic turnout.

4. As the Seventh Circuit recognized unanimously, Petitioners have standing to challenge the Photo ID Law. *First*, the Indiana Democratic Party has direct standing because the law will force it to divert resources to compensate for the suppression of turnout the law causes. *Second*, the Party has associational standing to sue on behalf of its affected members. *Third*, it has third-party standing to sue on behalf of voters who cannot, practically, bring a challenge themselves.

ARGUMENT

I. INDIANA'S PHOTO-IDENTIFICATION LAW SHOULD BE SUBJECTED TO HEIGHTENED CONSTITUTIONAL SCRUTINY.

A. The *Burdick* Standard

States, of course, play a crucial and legitimate role in regulating the political process to produce efficient and equitable elections. But this Court has long recognized the important role also played by courts in scrutinizing laws regulating the election process for purportedly legitimate and neutral reasons. Because such laws "will invariably impose

some burden upon individual voters," *Burdick*, 504 U.S. at 433, it is the duty of the courts to assure that the burden is justified in light of the state interests served. "'Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'" *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)).

Although not every election law is subject to strict scrutiny, in every case about the fundamental right to vote a court must balance the competing interests at stake, weighing the burden on the fundamental right to vote against the specific interests asserted by the State, and asking whether those interests could be served less restrictively:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). In conducting this analysis, the court "must not only determine the legitimacy and strength of each of [the State's] interests; it also must consider the extent to which those interests make it *necessary* to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789 (emphasis added); *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

Of central importance in this analysis, of course, is the degree of the burden on voting imposed by the law at issue. A severe burden is seldom justifiable. *See Burdick*, 504 U.S. at 434. And a key factor in assessing the law's validity is whether burdens on voting are imposed in a discriminatory fashion. As "restrictions become more severe, . . . and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). The Constitution simply does not tolerate restricting the fundamental right to vote on the basis of political viewpoint, party affiliation, age, race, or other demographic or socioeconomic factors.

Thus, for example, even a small fee for voting violates the First and Fourteenth Amendments (as well as the Twenty-fourth Amendment) because a law discriminating against the poor with respect to access to the polling booth is treated as inherently

and severely burdensome. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 124 & n.14 (1996); *Harper*, 383 U.S. at 666-67; *see also Bullock v. Carter*, 405 U.S. 134, 144, 149 (1972) (invalidating substantial filing fees for candidates seeking to enter party primaries). Another example of a discriminatory burden was addressed in *American Party of Texas v. White*, 415 U.S. 767, 794-95 (1974), where the Court invalidated a law that allowed only major-party candidates to appear on absentee ballots. That rule might not seem severely burdensome in the usual sense. After all, voters who wanted to vote for minor-party candidates simply had to show up at the polls. But despite the small number of individuals likely to be affected, the burden was severely discriminatory against those with particular political views, so the law was accorded heightened scrutiny. *See id.*

The absence of a severe burden does not necessarily mean that a law will pass constitutional muster. To the contrary, even "'reasonable, nondiscriminatory restrictions'" must still be convincingly justified by "'important regulatory interests'" identified by the State. *Burdick*, 504 U.S. at 434 (citation omitted). The Judiciary bears the ultimate responsibility to stand as a bulwark against any restriction on voting that is being used by those in power to entrench their position or to burden political opponents. Courts fulfill that responsibility by requiring States to justify every voting law as a good-faith effort to serve real and legitimate state interests in a manner that is not excessively burdensome. *See id.* Where the State cannot satisfy

that test, its law should be struck down even if the burdens it imposes are less than severe.

In assessing election laws, courts must be particularly wary of laws that will have the effect of promoting "the views of the one political party transiently enjoying majority power," *Tashjian*, 479 U.S. at 224, because legislators are known to "set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it." *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., dissenting). Indeed, "history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents." *Id.*

As this Court has long held, determining whether a particular state election law transgresses constitutional limitations is very much a matter of degree and requires full consideration of the "facts and circumstances behind the law." *Storer v. Brown*, 415 U.S. 724, 730 (1974). In making this assessment, courts examine the extent to which an election law departs from usual and customary regulations adopted elsewhere. As Justice Breyer explained in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), one of the "'danger signs'" of abuse of the power to regulate elections may be a disparity between the state law at issue and other comparable laws. *Id.* at 2493 (plurality opinion) (noting that Vermont's campaign contribution limit was the lowest in the Nation); *see Norman v. Reed*, 502 U.S. 279, 293-94 (1992) (invalidating a local ballot-access law that required a large number of signatures

compared with the statewide ballot-access law, and explaining that the "requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballots are narrow enough to pass constitutional muster"); *Dunn v. Blumstein*, 405 U.S. 330, 345-48 (1972) (invalidating a one-year residency requirement for voting, defended as an antifraud measure, based in part on a federal statute capping residency requirements for presidential elections at 30 days).[16]

A court should also give weight to evidence of actual intent to burden voting rights, whether circumstantial or direct. For example, in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), a blanket-primary law was challenged as burdening associational rights by forcing candidates to move to the political center to satisfy independent voters participating in the primary. *See id.* at 580. Invalidating the law, this Court said it was "unnecessary to cumulate evidence of this phenomenon, since . . . the whole *purpose* of [the law] was to favor nominees with 'moderate' positions." *Id.*

Under these standards, Indiana's Photo ID Law should be subjected to heightened scrutiny.

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[16] *See generally* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. (forthcoming Dec. 2007), *available at* http://ssrn.com/abstract=980079.

B. Indiana's Photo-Identification Law Requires Heightened Scrutiny Because It Is Burdensome and Discriminatory.

The Seventh Circuit's central error in this case was its failure to apply the heightened scrutiny appropriate for a law that imposes severe and discriminatory burdens on voting by one class of individuals — nondrivers who lack government-issued photo identification and cannot readily obtain it. As Judge Wood pointed out in her dissent from the denial of rehearing *en banc*, the claim here is that the law effectively disenfranchises these would-be voters. Pet. App. 152a-153a. If a nondriver (1) lacks the certified copy of the birth certificate needed to obtain a photo ID, (2) cannot obtain a certificate, and (3) is not authorized to vote by mail-in absentee ballot, the burdens are generally insuperable. The only exception is for voters who can swear to being indigent. But they are forced to navigate the pointlessly Byzantine process of signing an affidavit and casting a provisional ballot at the polling place, and then going to the county courthouse or election board within ten days to sign *another* affidavit attesting to indigency.

For the voters to whom it is offered, that option is close to meaningless. Indeed, this Court long ago recognized that a State may not avoid charges of discrimination against the indigent in access to the polls by creating a separate and burdensome method for allowing the indigent to vote. In *Harman v. Forssenius*, 380 U.S. 528 (1965), the Court held that the availability of an affidavit mechanism did not excuse a State's imposition of a poll tax. *See id.* at

531, 541-43. The Court deemed it unconstitutional for a State to give voters the choice of, on the one hand, paying a $1.50 poll tax and, on the other hand, undergoing the "cumbersome procedure" of obtaining and filing a witnessed or notarized affidavit certifying the voter's residence, especially when the affidavit provided the State nothing more than a "remote administrative benefit." *Id.* at 531, 541-43. Like the law in *Harman*, the Indiana Photo ID Law places gratuitous hurdles before those voters who cannot afford the price the State effectively demands for photo identification. Indeed, this scheme is far more onerous than the analogous one invalidated in *Harman*, which merely required voters to mail in a certificate attesting to their present and continued residency in the jurisdiction. *Id.* at 541.

It is no answer to say that the class of voters experiencing the most severe burdens caused by the Photo ID Law is relatively small or hard to identify. *See* Pet. App. 5a-6a. The courts below made much of the fact that Petitioners failed to identify specific voters who lacked a photo ID and would be unable to vote because of the Photo ID Law. *E.g.*, *id.* at 5a. But Petitioners' evidence included several examples of voters who lacked photo IDs, some of whom had tried unsuccessfully to obtain them. *Id.* at 49a-51a, 80a-81a. The District Court discounted their claims simply because these voters were elderly and thus could vote absentee. *Id.* at 80a-82a, 101a-103a.[17]

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[17] The option of absentee mail-in voting does not negate the burden that Indiana law now imposes on elderly voters who lack photo IDs and would have difficulty obtaining them.

But these voters exemplified problems that also would confront younger nondrivers, most of whom are not authorized by Indiana law to vote absentee. *See id.* at 27a-28a n.10, 52a-58a. Nothing more should be required to establish a severe burden on some voters.

Moreover, as Judge Wood explained in her dissent from the denial of rehearing, "[e]ven if only a single citizen is deprived completely of her right to vote — perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification — this is still a 'severe' injury for that particular individual." *Id.* at 154a. No decision by this Court has ever concluded that even a single voter is dispensable. *See id.* Nor would such a ruling be consistent with the individual nature of the fundamental right to vote. *See Board of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 698 (1989) ("The personal right to vote is a value in itself . . . ."); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (reaffirming that the right to vote is

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Absentee voting by mail requires advance planning and has burdens of its own. For all practical purposes, the voter is deprived of information about the candidates that surfaces in the final days of the campaign, because the ballot must arrive in the county election board's mailroom by noon on Election Day. Ind. Code § 3-11-10-11. This Court has recognized that discriminatorily denying some voters one of the two options can be unconstitutional even if the other option is open to all. *See American Party of Texas*, 415 U.S. at 795 (invalidating law allowing adherents of major parties to vote absentee but requiring supporters of minor parties to vote in person on Election Day).

"individual and personal in nature") (citing *United States v. Bathgate*, 246 U.S. 220, 227 (1918)); *see also Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (explaining that voting rights belong to individuals, not groups).

In any event, any question about the severity of the burden here can be put aside because the Photo ID Law's impact is not felt randomly. The burdens imposed by this law — whether they are deemed inherently severe or not — fall disproportionately on those would-be voters who are nondrivers due to their poverty, their advanced age, or their disabilities. So the almost-certain impact of the Photo ID Law, as the Seventh Circuit majority conceded, will be less participation in elections by this subclass of citizens. Pet. App. 3a, 5a; *see* Hershey Aff., J.A. 96-134, 292-97.

Empirical evidence supports this conclusion. According to a new study of voter turnout patterns in 2006 (when compared with 2000, 2002, and 2004) — a study co-authored by the State's own expert and published by the CalTech/MIT Voting Technology Project — the strictest voter-identification requirements, such as Indiana's Photo ID Law, placed "significant negative burdens on voters" and thus "depress[ed] turnout . . . [especially] for less educated and lower income populations." R. Michael Alvarez, Delia Bailey & Jonathan Katz, *The Effect of Voter Identification Laws on Turnout*, VTP Working Paper #57, Version 2, at 1, 3, 8, 16, 18, 21 (Oct.

2007), *available at* http://vote.caltech.edu/media/documents/wps/vtp_wp57b.pdf; *see* J.A. 265.[18]

In Marion County, turnout in the November 2006 general election declined significantly when compared with the November 2002 election, the last midterm election prior to enactment of Indiana's Photo ID Law, both in absolute terms and compared with the rest of the State.[19] In 2002, before the Photo ID Law was passed, Marion County turnout lagged turnout in the rest of the State by about three percentage points; in 2006, with the Photo ID Law in effect, that disparity grew to eight percentage points.[20]

While there may be other explanations for these shifts in turnout, the outcomes are consistent with the conclusion (reached below by the majority and dissent alike, *see* Pet. App. 3a-4a, 11a) that the Photo ID Law deters participation by persons in

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[18] This evidence was not available to the District Court, as the 2006 general election occurred seven months after the court ruled. *Cf. Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring) (declining to address Arizona voter ID law's constitutionality based on "speculation," and instead waiting for November 2006 election data on "the scope of the disenfranchisement that . . . [the law's] identification requirements will produce").

[19] *See* Indiana 2006 Voter Turnout Results, *available at* http://www.in.gov/sos/elections/2006%20Municipal%20Registration%20and%20Turnout.pdf; Indiana 2002 Voter Turnout Results, *available at* http://www.in.gov/apps/sos/election/general/general2002.

[20] *See id.*

lower socioeconomic brackets — particularly in Marion County where the District Court determined that nearly three-quarters of the Indiana adults lacking photo IDs reside. *See supra* pages 17 to 19.

That kind of discriminatory impact cannot be ignored in determining the extent of the justification to be demanded from the State. To the contrary, as already noted, numerous rulings of this Court consistently have held that election laws imposing burdens on discrete groups of voters (or their preferred candidates) require heightened scrutiny. As the Court put it in *Anderson*, "it is especially difficult for [a] State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." 460 U.S. at 793; *see Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views."). Under the *Burdick* standard, election laws that exhibit such discriminatory effects must be justified as necessary to serve very substantial state interests.

The need for heightened scrutiny is even more pronounced here because there is good reason to believe that the discrimination was intentional. Judge Evans, dissenting in the Seventh Circuit, called the Indiana Photo ID Law a "not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democrat." Pet. App.

11a. And there are clear indications that he was right.

To begin, as discussed below, the purported reason for the enactment — stamping out in-person voter-impersonation fraud — is totally lacking in empirical support. There is no evidence that this kind of fraud occurs to any significant extent either in Indiana or anywhere else in the United States. It simply is not a problem, probably because it is an exceedingly irrational way to go about trying to alter an election outcome. There would have to be too many co-conspirators with too great a chance of being detected.

And even if this kind of fraud were a real concern, there would have been less restrictive ways to address that concern in an effective way. Indeed, Indiana's Photo ID Law is among the most restrictive voter-identification laws in the Nation in three respects.

First, Indiana's law requires very specific forms of ID — with a photograph, with a name that "conforms" to the voter's name as it appears on the registry, with an expiration date, and issued by the federal or state government (not by a local government, a private university, or an employer). Ind. Code § 3-5-2-40.5.

Second, the Indiana law rejects other forms of identification that other States, as well as the Federal Government, routinely accept. For example, under HAVA, which was enacted by overwhelming and bipartisan majorities in both Houses of Congress, certain voters are required to present

identification either when they register or when they first vote in a federal election. 42 U.S.C. § 15483(b). But Congress expressly approved the use of photo IDs that are not issued by federal or state agencies, as well as copies of "a current utility bill, bank statement, government check, paycheck, or other government document [including an expired government-issued photo ID] that shows the name and address of the voter." *Id.* § 15483(b)(2)(A); *see also Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1338 (N.D. Ga. 2005) (citing Georgia and Indiana as the "only two states that requir[e] registered voters to present a Photo ID as an absolute condition of being admitted to the polls and being allowed to cast a ballot," and noting that 30 States "do not require registered voters to present any form of identification as a condition of admission to the polls or to cast a ballot").

Third, the universe of citizens to which Indiana's Photo ID Law applies is exceptionally broad. The only ID-less voters allowed to cast a regular (nonprovisional) ballot in person on Election Day are those who live in state-licensed nursing homes that also serve as polling places. Ind. Code § 3-11-8-25.1(e). And unlike most States,[21] Indiana prohibits most voters (other than senior citizens) from opting for mail-in absentee ballots, rather than in-person voting. *Id.* § 3-11-10-24(a). Thus, with regard to

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[21] *See* Pre-Election Day and Absentee Voting by Mail Rules (listing 29 States, including Georgia, that allow no-excuse absentee voting by mail), *available at* http://www.electionline.org/Default.aspx?tabid=474.

voter identification, Indiana now holds a position akin to that held by Vermont with regard to campaign contribution limits, before this Court's decision in *Randall*. *See* 126 S. Ct. at 2485 (invalidating the lowest contribution limit in the Nation because it imposed burdens that were "disproportionately severe").

Furthermore, the circumstances of the law's enactment are studded with "danger signs" of abuse of the power to regulate elections. *See id.* at 2492-93 (plurality opinion). Forms of photo ID have been issued by States for decades. But not until 2005 did any State require every in-person voter to show photo identification. Then such laws started to be passed only in Republican-controlled legislatures around the country, during a time when there was a heightened awareness of the possibility of close elections due to nationwide partisan parity.[22]

In Indiana, the law was enacted during the brief period of Republican unified control of the state government, on a party-line vote. In passing the law, moreover, Indiana deliberately chose to battle supposed fraud in in-person voting while not taking comparable steps concerning the type of voting where problems were well documented — mail-in absentee voting. Legislation need not deal with all

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[22] *See, e.g.*, *Common Cause/Ga.*, 406 F. Supp. 2d at 1331 (Georgia's photo ID bill passed with support from 89 House Republicans, 31 Senate Republicans, only 2 House Democrats, and zero Senate Democrats); *see also* David C. Iglesias, Op-Ed, *Why I Was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21.

phases of a problem in the same way," but "the distinctions drawn [must] have some basis in practical experience." *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). And legislatures may "respond to potential deficiencies in the electoral process with foresight rather than reactively," but only if "the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Where, however, the legislature has fashioned a burdensome solution for a nonexistent problem, while leaving real problems unaddressed, its motives are at least suspect. *See Clingman*, 544 U.S. at 603 (O'Connor, J., concurring) (requiring proof that state election laws "are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions").

This Court need not, ultimately, make a determination that partisan goals were in fact the driving force behind the Indiana law. The *Burdick* standard does not turn on such a finding. But that standard should be applied with particular stringency when there is every circumstantial reason to believe that a given law was designed to suppress votes cast for political competitors. As Justice O'Connor noted in *Clingman*, the State "is not a wholly independent or neutral arbiter, [but rather] . . . is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." 544 U.S. at 603 (concurring opinion). Here, the Court should demand a strong justification for a

law passed under circumstances giving rise to real concerns about the abuse of the State's power to regulate elections.

II. THE STATE CANNOT JUSTIFY THE DISCRIMINATORY BURDENS THAT THE PHOTO-IDENTIFICATION LAW IMPOSES ON INDIANA VOTERS.

Regardless of what level of scrutiny applies, the State bears the burden of coming forward with "'precise interests . . . as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (citation omitted); *see also Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting) (state laws that burden First Amendment rights are upheld only when they are "'tied to a particularized legitimate purpose'") (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973)).

Once the State comes forward with its "precise interests," the Court "not only [must] determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Tashjian*, 479 U.S. at 214 (emphasis added; citation and internal quotation marks omitted). Thus, the Court is charged with ensuring not only that the State's interests are legitimate and sufficiently substantial, but also that there is a close fit between the means the State uses to effectuate its interests and the ends it hopes to achieve. *See Randall*, 126 S. Ct. at 2492-93 (plurality opinion) ("[C]ourts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the

restrictions."); *see also Shaw v. Hunt*, 517 U.S. at 908 ("[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." (citation and internal quotation marks omitted)).

Here, the State has no substantial interest in combating a problem that the State itself has conceded is nonexistent. The plain fact is that the system of signature verification used for many decades, backed up by state and federal criminal penalties punishing fraudulent voting, worked extraordinarily well to prevent in-person voter fraud. Nor may the State cite generalized fears of voter fraud to justify a burdensome law targeting a specific form of fraud that has never actually occurred in Indiana and is highly unlikely to occur. In sum, because the State's interests are so weak, the State cannot show that it is "'*necessary* to burden the plaintiffs' rights'" in this manner. *Tashjian*, 479 U.S. at 214 (emphasis added; citation omitted).

A. The Photo-Identification Law Cannot Be Justified as Combating the Nonexistent Problem of Voter-Impersonation Fraud in Indiana Elections.

The "precise interests" put forward by the State of Indiana for the Photo ID Law are its "compelling state interest in deterring and detecting in-person voter identity fraud," State Mot. for Summ. J. at 45 (Dec. 1, 2005), and its "recognized interest in ascertaining a voter's identity," Pet. App. 106a. These interests are certainly substantial in the abstract. States should and do play a key role in combating election fraud. But these interests cannot

justify the burden that the State of Indiana has imposed on voters, since there has been no showing at all that the particular problem the State purports to combat actually exists.

It is undisputed that there is absolutely no evidence of voter-impersonation fraud in Indiana. Not only has "no one in Indiana . . . been prosecuted for impersonating a registered voter," *id.* at 7a, but Respondents concede that they are not even aware of any "incidents or person attempting [to] vote, or voting, at a voting place with fraudulent or otherwise false identification." *Id.* at 39a (citing interrogatory response). Nor have there ever been any *reports* of voter-impersonation fraud in Indiana. *See id.* at 8a. Judge Posner speculated that, in the "more likely sequence" in which the legitimate registered voter had "voted already when the impersonator arrived and tried to vote in his name," no arrest would ensue because "the resulting commotion would disrupt the voting." *Id.* But that is pure conjecture, as there is no evidence whatsoever that a single person in Indiana has ever come to the polls on Election Day and tried to vote under the name of a person who already had voted.

That the State has not come forward with a single piece of evidence showing in-person voter fraud in Indiana should be no surprise. Anyone who wants to corrupt election outcomes has far better options than pretending to be someone else at the polls. At best, such a voter-impersonation scheme might net a few illegal votes as the impersonator travels from precinct to precinct. In contrast, a scheme that involved bribing the officials who count the ballots,

or tampering with electronic voting machines, or stuffing the ballot box with absentee ballots, could actually sway the outcome of an election, as was recently demonstrated in East Chicago. *See Pabey*, 816 N.E.2d at 1140-41, 1145. Yet the Photo ID Law does nothing to attack these areas of legitimate concern and instead targets a nonexistent problem.

When the State defends a regulation such as the one at issue here "as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion) (internal quotation marks omitted). The State "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* Thus, a law "perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *Id.* (citation and internal quotation marks omitted). Here, the problem cited by the State simply does not exist, and the State has offered nothing but speculation and conjecture regarding the harm it allegedly seeks to prevent.

Although the Court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997), it has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000). Some "quantum of empirical evidence [is] needed to satisfy

heightened judicial scrutiny of legislative judgments." *Id.* at 391. And precisely how much evidence is required will "vary up or down with the novelty and plausibility of the justification raised." *Id.* Without any evidence at all that voter-impersonation fraud has ever occurred in Indiana's past or that it currently threatens Indiana's electoral system, the State's justification for its Photo ID Law is utterly implausible.

B. The Photo-Identification Law Cannot Be Justified as Combating Some Potential Future Problem of Voter-Impersonation Fraud in Indiana Elections.

Absent any evidence at all that voter-impersonation fraud is occurring or has occurred in Indiana, the State raises the specter that it might occur at some future point, and thus claims it is entitled to pass prophylactic legislation. The State's asserted justification is baseless, however, because voter-impersonation fraud is exceedingly rare everywhere, and thus highly unlikely to pose a future threat to the electoral system of Indiana.

1. Voter-Impersonation Fraud Is Exceedingly Rare Nationwide.

The Seventh Circuit conceded that there was no evidence of voter-impersonation fraud in Indiana but nonetheless credited reports (that it did not cite) for the proposition that "[s]ome voter impersonation has been found" nationally. Pet. App. 8a. The court admitted there was "not much," but pointed to Florida, Illinois, Michigan, Missouri, and Washington as places where such fraud had

occurred. *Id.* (no citation provided). But even the scanty evidence relied upon by the Seventh Circuit of "not much" voter-impersonation fraud is exaggerated.

The evidence the State presented of fraud in Florida revolved around the 1997 Miami mayoral election. But as the Florida state courts found, that election was plagued by "a massive, well conceived and well orchestrated absentee ballot voter fraud scheme," not by voter-impersonation fraud at the polls. *In re the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998) (internal quotation marks omitted). As for Illinois, the State's evidence of "voter fraud" consisted of a single newspaper article about a gubernatorial election 25 years ago. *See* State Ex. 13. In Michigan, an investigation by the Secretary of State into alleged voting by deceased persons in 2005 uncovered no substantiated reports of voter-impersonation fraud, but instead "documented instances of violations of election law . . . relating to absentee ballots." Lisa Collins, *In Michigan, Even Dead Vote*, DETROIT NEWS, Feb. 26, 2006; *see also* Kelly Chesney, *Claims That the "Dead" Voted Were Wrong*, DETROIT NEWS, Mar. 5, 2006. In Missouri, an investigation into the 2000 election in St. Louis found that the "alleged voter fraud conspiracy in St. Louis was nothing more than a case of managerial ineptitude, administrative under-funding, and poor implementation of the NVRA [National Voter Registration Act of 1993] on the part of St. Louis and Missouri election officials." Lorraine C. Minnite, AN

ANALYSIS OF VOTER FRAUD IN THE U.S. 16 (Sept. 2007), *available at* http://www.demos.org/pubs/analysis_voter_fraud.pdf. And finally, most of the 19 reports of voter-impersonation fraud in the 2004 Washington gubernatorial election involved absentee ballots rather than in-person voting and therefore would not have been prevented by a photo ID requirement. *See* Phuong Cat Le & Michelle Nicolosi, *Dead Voted in Governor's Race*, SEATTLE POST-INTELLIGENCER, Jan. 7, 2005.

In contrast to these largely irrelevant anecdotes relied upon by the Seventh Circuit (without citation or elaboration), a recent study commissioned by the federal Election Assistance Commission reported that "impersonation of voters is probably the least frequent type of [election] fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election." U.S. Election Assistance Comm'n, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 9 (Dec. 2006) [hereinafter "EAC Report"], *available at* http://www.eac.gov/clearinghouse/reports-and-surveys/. As the EAC Report found, "absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying, and voter registration fraud." *Id.*

Similarly, a recent Department of Justice ("DOJ") report comprehensively surveying election-related misconduct since 2002 confirmed that voter-impersonation fraud is not a threat to the integrity of elections. *See* Press Release, DOJ, Fact Sheet: Department of Justice Ballot Access and Voting

Integrity Initiative (July 26, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html. Not a single one of the convictions detailed in the DOJ report involved in-person voter-impersonation fraud. *Id. See generally* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1.

Likewise, the most comprehensive study of voter fraud to date reveals absolutely no confirmed incidents of voter-impersonation fraud. Professor Lorraine Minnite of Barnard College and David Callahan of Demos reviewed news and legal databases and interviewed attorneys general and secretaries of state in 12 States, representing about half of the national electorate, about incidences of election fraud from 1992 to 2002. *See* Minnite & Callahan, *supra*, at 15 (describing research conducted regarding Alabama, California, Florida, Georgia, Illinois, Minnesota, Mississippi, New York, Oregon, Pennsylvania, Texas, and Wisconsin). Not a single incident of election fraud in their report involved voter-impersonation fraud or would have been deterred by mandatory photo ID laws. These findings recently were confirmed in a report issued by the Brennan Center for Justice, which examined allegations of voter fraud nationally and found only "a handful of substantiated cases of individual ineligible voters attempting to defraud the election system." Justin Levitt, THE TRUTH ABOUT VOTER FRAUD 7 (Nov. 1, 2007), *available at* http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf.

Other States and localities that have passed photo ID laws have similarly been unable to cite any

examples of voter-impersonation fraud to justify those laws. *See Common Cause/Ga.*, 406 F. Supp. 2d at 1361 (testimony from Georgia's Secretary of State that "the State had not experienced one complaint of in-person fraudulent voting during her [nine-year] tenure"); *Weinschenk v. Missouri*, 203 S.W.3d 201, 218 (Mo. 2006) (noting that Missouri's photo ID law "could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri"); *Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes*, 506 F. Supp. 2d 598, 615 (D.N.M.) ("[T]he parties have presented no evidence of voter fraud or voting irregularities among Albuquerque voters who vote in person at their precinct polling place on election day."), *appeal pending*, No. 07-2067 (10th Cir. 2007); *see also In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, *29 (2007) (Cavanagh, J., dissenting) ("there is *no* evidence of in-person voter fraud that will be corrected by the photo-identification requirement and no credible evidence of this problem existing *nationwide*").

There is, in sum, no evidence that voter-impersonation fraud is a problem in the United States. And, as shown below, there are less restrictive means already in place to combat it, should it ever become a problem.

2. The State's Asserted Interest in Combating Potential Future In-Person Voter Fraud Can Be Served by Less Restrictive Means.

Anyone who commits in-person voter-impersonation fraud in Indiana is subjecting himself

to significant criminal penalties for little or no gain. Where a State already has "substantial criminal penalties" and there is "no indication that [they] . . . will be insufficient to police" the feared violations, there is no justification for further regulation burdening fundamental rights. *Buckley v. Valeo*, 424 U.S. 1, 56 (1976); *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349-53 (1995) (finding that the State's interest in preventing election fraud could not justify prohibiting anonymous election leafleting where the state election code's other "detailed and specific prohibitions" targeted the fraud the State allegedly feared); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-37 (1980) (finding that the "legitimate interest in preventing fraud can be better served by measures less intrusive," such as "penal laws used to punish such conduct directly"); *Dunn*, 405 U.S. at 353 (recognizing that the State "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared").

The Indiana Election Code makes it a Class D felony to "knowingly vote[] or make[] application to vote in an election in a name other than the person's own; or . . . having voted once at an election, knowingly appl[y] to vote at the same election in the person's own name or any other name." Ind. Code § 3-14-2-12. It is likewise a felony to "[c]onspire[] with an individual for the purpose of encouraging the individual to vote illegally," *id.* § 3-14-2-1, or to "knowingly vote[] or offer[] to vote at an election when the person is not registered or authorized to vote," *id.* § 3-14-2-9. A Class D felony results in a

prison sentence between six months and three years, with the advisory sentence being 18 months. *Id.* § 35-50-2-7. In addition, the individual may be fined up to $10,000. *Id.* Further, the State punishes by up to a year in prison and $5,000 the "withhold[ing of] any information from the poll taker with regard to the qualifications of a voter or person not entitled to vote" or "furnish[ing] to a poll taker any false information with regard to the qualifications of any person for voting." *Id.* § 3-14-2-7. Federal law likewise punishes both voter-impersonation fraud and voting more than once in a federal election by up to five years in prison and a $10,000 fine. *See* 42 U.S.C. §§ 1973i(c), 1973i(e), 1973gg-10(2)(B).

Given the nonexistence of any voter-impersonation fraud in Indiana to date, these criminal penalties more than suffice to achieve the State's interest in deterrence. *See Buckley*, 424 U.S. at 70 (noting that the interest in deterrence "may be reduced" where the threat is minimal). Even beyond the federal and state criminal penalties, however, the system of signature verification used in Indiana since at least 1930 has adequately served the State's deterrence interests for decades. *See also supra* pages 37 to 39 (describing less-restrictive voter-identification rules under HAVA and the laws of other States, which adequately protect the governmental interest in deterring in-person voter-impersonation fraud).

It is ironic that Indiana continues to rely on signature verification for absentee voters, *see* King Dep. 126, while requiring in-person voters to show photo ID, even though there is far greater potential

for fraud with absentee balloting than with in-person voting. *See, e.g.*, EAC Report at 9. Nonetheless, the State uses only signature verification for absentee ballots, and the District Court specifically found that "[t]he signature comparison permits election officials to ensure that there is no fraud and that the election is both safe and secure." Pet. App. 27a n.10 (citing King Dep. 126). If such a signature comparison can "ensure that there is no fraud" with respect to absentee balloting, *id.*, there is no reason that it cannot ensure fraud-free in-person voting. When "there are other, reasonable ways to achieve [legitimate state] goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn*, 405 U.S. at 343 (citation omitted).

Both in Indiana and throughout the United States, whatever serious election fraud exists involves corrupting election officials, tampering with voting equipment, or abusing absentee mail-in ballots. *See* EAC Report at 9. Because Indiana's Photo ID Law does nothing to combat those problems, and instead targets a problem that is unlikely to occur, the law is not justifiable under the *Burdick* standard based on the asserted state interest in preventing election fraud.

C. The Photo-Identification Law Cannot Be Justified by the State's Once-Bloated Registration Rolls.

Desperate for a plausible justification, the State has argued that its own violations of federal law justify burdening its voters by mandating photo ID.

But a State's violations of federal statutes cannot justify its own further violations of the United States Constitution.

Indiana has long been out of compliance with Section 8 of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, which requires regular updating of voter rolls. As the District Court found, Indiana had the "largest discrepancy in the nation between official registration numbers and self-reported rate of registration." Pet. App. 40a.

But that problem cannot justify the Photo ID Law. *First*, in principle, a State never should be allowed to use its own noncompliance with federal law as an excuse for burdening its citizens' voting rights. *Second*, such an argument rings particularly hollow here, absent any evidence that in-person voting fraud occurred during all the years when the rolls were bloated. *Third*, the voter-roll problem is on its way to being rectified. In 2006, the Attorney General of the United States sued the State for violating the NVRA. J.A. 309-17. The parties settled, and the State of Indiana agreed take specific steps to remove ineligible voters from its voter-registration lists. *See id.* at 299-307. So the problem of bloated voter rolls is being addressed. Any argument that Indiana is uniquely susceptible to voter-impersonation fraud due to its bloated registration rolls is now gone.

D. The Photo-Identification Law Cannot Be Justified as Combating Public Fears of Voter Fraud.

Even less persuasive is the State's attempt to use public fears about voter impersonation to justify its alleged antifraud program. Petitioners certainly do not dispute that a State "has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). Nor do they dispute that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam).

But when a state election law effectively disenfranchises voters, the Court should be loath to accept as a primary justification the claim that the law will calm public fears of corruption. That is particularly true where, as here, the law does not address any actual problem and, in fact, leaves in place the very problems causing public concerns. *See, e.g.*, *Randall*, 126 S. Ct. at 2485, 2492-93 (striking down campaign-finance regulation that was not tailored to the interest in avoiding the appearance of corruption); *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-98 (1985) (same); *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 185 n.72 (2003) (plurality opinion) (requiring "concrete evidence that a particular type of [transaction] . . . gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that . . . apparent corruption"); *Republican Party of Minn. v.*

White, 536 U.S. 765, 776 (2002) (striking down state statute because it was not tailored to the interest in achieving appearance of impartiality).

According to the Indiana Secretary of State's recent written testimony submitted to the U.S. House of Representatives, it is absentee-ballot fraud that has "erode[d] public confidence in [Indiana's] electoral process" — not voter-impersonation fraud. Test. of Sec'y Rokita, U.S. House Admin. Comm., Subcomm. on Elections, Oct. 16, 2007, at 1. Yet despite the District Court's and the Seventh Circuit's repeated invocation of the terms "voting fraud" and "voter fraud," *e.g.*, Pet. App. 6a-7a, 38a-39a, 106a-107a, the Photo ID Law did not even purport to address anything other than in-person voter-impersonation fraud at the polls on Election Day. It is thus unpersuasive for the State to claim that the Photo ID Law, which does not address any actual fraudulent practices, will alleviate public fears of fraud.

Such a justification is especially troubling where, as here, the public fears have been stoked by the State's own propaganda. A State cannot justify burdening the minority's voting rights simply by using its access to the media to inflame public opinion. *See Weinschenk*, 203 S.W.3d at 218 (condemning the State's "tactic of shaping public misperception" to justify a photo ID law). An interest justifying disenfranchisement should not be so easily manufactured.

Nor should the Court ignore the negative effects of legislation like the Photo ID Law on public confidence in the electoral system. After all, few

things are more likely to erode faith in our democracy than a perception that a narrow partisan majority in the legislature has manipulated electoral rules in an effort to suppress turnout and squelch competition.

III. THE COURTS BELOW CORRECTLY HELD THAT PETITIONERS HAVE STANDING.

In opposing certiorari, Respondents argued that Petitioners lacked standing to bring this case. As the courts below correctly held, that is incorrect. Pet. App. 4a, 96a. As Judge Posner recognized, the Democratic Party Petitioners' standing is established in multiple ways. *Id.* at 4a. *First*, Petitioners have direct standing to challenge Indiana's Photo ID Law because it compels the Democratic Party to divert resources from its core activities and expend them to counteract the law's corrosive effects on voter turnout. *Second*, Petitioners have associational standing to sue on behalf of their members, whose constitutional rights to vote and to equal protection have been injured by the statute. *Third*, Petitioners have third-party standing to sue on behalf of voters who inadvertently fail to bring their photo IDs to the polls on Election Day.

1. To demonstrate standing, a plaintiff must show that it has suffered "a concrete and particularized injury that is either actual or imminent," that the injury can be "fairly trace[d]" to the defendant, and that a favorable judicial decision will redress that injury. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007). If it satisfies these requirements, an association such as the Indiana Democratic Party may sue to vindicate its rights.

See Warth v. Seldin, 422 U.S. 490, 511 (1975); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977); *NAACP v. Button*, 371 U.S. 415, 428 (1963). It is undisputed here that Indiana's statute will require the Party "to divert its limited resources away from activities such as get-out-the-vote efforts and providing resources for Democratic Party candidates." Treacy Aff. 2. Instead, Democrats must expend those resources on informing voters of the law's requirements, assisting voters to get identification, and monitoring poll workers to ensure the law is neither misapplied nor abused. *Id.* In short, the Photo ID Law inflicts a cognizable injury upon the Indiana Democratic Party. Pet. App. 4a ("the new law injures the Democratic Party"); *see Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 (1991) (finding standing in citizens group where challenged statute made it "more difficult" for the group to achieve its aims); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding standing where organization suffered "drain on [its] resources" due to challenged practice); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (finding state Democratic Party had standing where the challenged action would cause it economic loss). Because this injury stems from Respondents' implementation of the challenged law and because injunctive relief against the law's enforcement would remedy the Democratic Party's imminent injury, Petitioners have standing to bring this suit. *See Warth*, 422 U.S. at 511.

2. As the Seventh Circuit correctly held, Petitioners also have associational standing to sue on behalf of their affected members, citizens who support the Democratic Party and its purposes but lack the mandated photo ID.[23] Pet. App. 3a-5a; J.A. 194-95 (defining party membership). An association may sue on its members' behalf when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see, e.g., Schweiker v. Gray Panthers*, 453 U.S. 34, 40 n.8 (1981). All three requirements are met here.

First, party members blocked from voting by the Photo ID Law would have standing to challenge the

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[23] Like the District Court, Respondents have claimed that the Indiana Democratic Party has no members. State Br. in Opp'n at 25 (filed Aug. 6, 2007); State Supp. Br. in Opp'n at 2-3 (filed Sept. 17, 2007); Pet. App. 77a-78a. This Court, like the Seventh Circuit, should reject that claim. Pet. App. 4a. That membership in the Indiana Democratic Party is broadly available does not make it any less real. An individual may be a member of a political party even when his participation is limited to "casting . . . votes for some or all of the Party's candidates." *Tashjian*, 479 U.S. at 215. No "act of formal enrollment or public affiliation with the Party" is required. *Id.*; *see Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

law. As the Seventh Circuit recognized, there can be no doubt that these people exist, and they are likely to be Democratic voters. Pet. App. 3a-4a. *Second*, helping party members vote for Democratic candidates is "germane" to the Party's overarching purpose: securing the election of Democratic candidates to public office. Treacy Aff. 2. *Third*, as the Democratic Party is seeking only injunctive relief, there is no need for participation by individual members affected by the law. *See Warth*, 422 U.S. at 515.

3. Finally, Petitioners have third-party standing to vindicate the rights of voters who inadvertently fail to bring their photo IDs to the polls on Election Day. A plaintiff may bring an action as a third party where (a) the third party itself has suffered an injury, (b) the two parties have a close relationship, and (c) the first party's ability to bring suit on its own behalf is hindered. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). All three requirements are met here.

First, by preventing Democratic voters without photo ID from voting, the law frustrates the Democratic Party's efforts to get Democratic candidates elected. Treacy Aff. 2. *Second*, the Party and these injured Democratic voters have a symbiotic relationship because "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). *Third*, voters who may forget to bring their photo IDs to the polls cannot sue for injunctive relief in advance because

they "will not know about their impending disenfranchisement until election day, when it will be too late to challenge the rules." *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 423 (E.D. Mich. 2004) (holding that political party had third-party standing to assert voters' rights); *see Barrows v. Jackson*, 346 U.S. 249, 257 (1953).[24]

CONCLUSION

The Court should reverse the judgment below.

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[24] As for voters who know in advance that they do not have and cannot afford to obtain the requisite photo ID, the prospects for bringing suit are also bleak. The discrete benefit accruing to one individual challenging the Photo ID Law is so small compared to the burdens of prosecuting this litigation that, without third-party standing, this suit would never have been brought. *See Campbell v. Louisiana*, 523 U.S. 392, 398 (1998).

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